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CITATIONS

484206—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 334

QUINCY AND ILA MINGORI, PETITIONERS

v.

LYNN R. BRODERICK, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its findings and conclusions appear at R. 23–25. The opinion of the Circuit Court of Appeals (R. 115–117) is reported in 128 F. 2d 996.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 22, 1942. (R. 117.) The petition for a writ of certiorari was filed on August 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Will injunction lie to restrain the collection of taxes on distilled spirits duly assessed by the Commissioner of Internal Revenue under color of office?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.[1]
>
> (a) *Tax.*—* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * * *

(U. S. C., Title 26, Sec. 3653.)

STATEMENT

This is a proceeding to restrain the collection of taxes duly assessed by the Commissioner of Internal Revenue on distilled spirits, a liquor dealer's tax and percentage additions thereto as required by law, in the amount of $17,937.34, for the taxable period November 1, 1936, to June 30, 1938. (R. 9.)

Defendant's motion to dismiss (R. 17) was overruled (R. 18). Thereupon an answer was filed without waiving the grounds of the motion. (R. 19.) At the trial which ensued it was shown that the tax had been assessed by competent authority as a result of an investigation made by the Bureau of Internal Revenue. (R. 23, 24, 46, 48, 97–105.)

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[1] Formerly Section 3224, Revised Statutes.

The District Court found that the petitioners had not been engaged in activities subject to the taxes imposed, and were not possessed of funds or property with which to pay the amounts assessed.

Judgment was entered on October 9, 1941 (R. 26–27), permanently restraining the Collector. An appeal (R. 27–32) was taken to the Circuit Court of Appeals and the judgment of the District Court was reversed (R. 117–118). By order of August 11, 1942, Lynn R. Broderick, Collector of Internal Revenue, was substituted for former Collector Burke. (R. 118–119.)

ARGUMENT

1. Section 3653 of the Internal Revenue Code (formerly Section 3224 of the Revised Statutes) prohibits the maintenance of any suit for the purpose of restraining the assessment or collection of a federal tax. Despite the broad sweep of the section injunctions have been permitted in several cases where exceptional and extraordinary circumstances were thought to exist. Although the dissents in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, and *Allen* v. *Regents*, 304 U. S. 439, indicate that the recognition of exceptions to the statute is questionable, the decisions which have announced such exceptions are distinguishable here on their facts.

The tax on distilled spirits imposed by the Liquor Tax Act of 1934 is a basic production tax of $2 per proof or wine gallon whether legally or illegally distilled. It is a tax on the product and not a

penalty. The tax and a lien therefor attaches as soon as the product is in existence. *Various Items* v. *United States,* 282 U. S. 577, 579; *United States* v. *Rizzo,* 297 U. S. 530, 533; *United States* v. *One Ford Coupe,* 272 U. S. 321, 328.

The special tax on wholesale liquor dealers imposed by Sections 3232, 3237, as amended, and 3244 of the Revised Statutes is also a tax and not a penalty. *United States* v. *Constantine,* 296 U. S. 287, 293–294; *Sonzinsky* v. *United States,* 300 U. S. 506, 512, 514. The percentage additions to the tax are not penalties but incidents of the assessment and collection of the tax as a part thereof. *Helvering* v. *Mitchell,* 303 U. S. 391, 403.

Accordingly decisions restraining the collection of penalties are not in point. In that class fall *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, which involved specific penalties and taxes required to be doubled under Section 35, Title II, of the National Prohibition Act. With respect to those cases this Court in *Graham* v. *du Pont,* 262 U. S. 234, 257, said that they "were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense."

The internal revenue laws provide a complete and adequate remedy at law by paying the tax and suing to recover it. *Graham* v. *du Pont, supra,* at 254–255; cf. *Kohn* v. *Central Distributing Co.,* 306 U. S. 531. The same remedy is applicable to liquor taxes. Whether or not a liquor tax is rightfully due

may only be determined in a suit for refund. *Jacoby* v. *Hoey,* 86 F. 2d 108 (C. C. A. 2d), certiorari denied, 299 U. S. 613; *Larson* v. *House,* 112 F. 2d 930 (C. C. A. 5th); *Rothensies* v. *Lichtenstein,* 91 F. 2d 544 (C. C. A. 3d).

2. No exceptional circumstances are here involved which would justify the application of *Allen* v. *Regents* or *Miller* v. *Nut Margarine Co., supra.* Assertions that the tax is illegal and unconstitutional are insufficient to create an exception warranting injunctive relief. *Dodge* v. *Osborn,* 240 U. S. 118, 121–122; *Bailey* v. *George,* 259 U. S. 16. Hardship and inability to pay the tax do not create an exception. In *Jacoby* v. *Hoey,* 15 F. Supp. 388 (S. D. N. Y.), affirmed, 86 F. 2d 108 (C. C. A. 2d), certiorari denied, 299 U. S. 613, the complaint alleged that the taxpayer had no funds available to pay the tax and would suffer irreparable loss, but injunctive relief was denied. See also *Coletti* v. *Cassidy,* 12 F. Supp. 21 (Wyo.); *Kessler* v. *Rothensies,* 15 F. Supp. 387 (E. D. Pa.). The irreparable injury must be such that a money award would not be adequate. *Red Star Yeast & Products Co.* v. *La Budde,* 83 F. 2d 394, 396 (C. C. A. 7th). Cf. *Larson* v. *House,* 112 F. 2d 930 (C. C. A. 5th), where injunction was denied although the taxpayers had been acquitted of a charge of conspiracy to violate the Prohibition Act.

3. The action of the Commissioner in assessing the taxes was not arbitrary or capricious. The assessments were made in due course under color

of office upon reports submitted by revenue officers after investigation. The Commissioner is empowered by law to make the assessment upon evidence in his possession. *Jacoby* v. *Hoey*, 86 F. 2d 108, 109 (C. C. A. 2d); *Rothensies* v. *Lichtenstein*, 91 F. 2d 544, 546 (C. C. A. 3d).

4. The reversal by the Circuit Court of Appeals was on the ground that the District Court was without jurisdiction. In such a situation Rule 52 of the Federal Rules of Civil Procedure is clearly inapplicable. If the District Court had no jurisdiction to receive evidence, its findings must be ignored so far as they depend upon the evidence.

CONCLUSION

This case does not present a problem of general importance. There is no conflict of decisions. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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